



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2004

Ms. Julie Joe
Assistant County Attorney
Travis County
P. O. Box 1748
Austin, Texas 78767

OR2004-10316

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 214329.

The Travis County District Attorney's Office (the "district attorney") received a request for "documents and things relating to any investigation of or action against [a named individual] in or around 2002 by the District Attorney's Office." You claim that portions of the requested information are not subject to the Public Information Act (the "Act"). In the alternative, you claim that this particular information, as well as the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

You claim that portions of the submitted information are not subject to the Act. This office has concluded that grand juries are not subject to the Act and that records that are within the constructive possession of grand juries are not public information subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See id.*

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *See id.* You state that the district attorney obtained portions of the submitted information pursuant to grand jury subpoenas. Thus, we understand from your representation that the district attorney is maintaining this particular information as agent of the grand jury and that these records are in the constructive possession of the grand jury. Accordingly, we conclude that the information that we have marked is not subject to the Act and need not be released to the requestor in response to this ruling.

We note that portions of the remaining submitted information that we have marked constitute an arrest warrant and supporting affidavits. The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to provide:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26. Thus, article 15.26 of the Code of Criminal Procedure makes the marked arrest warrant and supporting affidavits public. As a general rule, the exceptions to disclosure found in chapter 552 of the Government Code do not apply to information that is made public by other statutes. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989).* Accordingly, we conclude that the marked arrest warrant and supporting affidavits must be released to the requestor.

We also note that the remaining submitted information includes search warrant affidavits. Article 18.01(b) of the Code of Criminal Procedure provides in relevant part:

A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). Based on this provision, the submitted search warrant affidavits that we have marked are deemed public. The exceptions found in the Act generally do not apply to information made public by other statutes. *See Open Records Division No. 525 (1989) (statutory predecessor).* Accordingly, we conclude that the district attorney must release these marked search warrant affidavits to the requestor.

Next, we note that the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The remaining submitted information constitutes records from a completed investigation made of, for, or by the district attorney. Thus, this particular information must be released, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Because the district attorney claims that this information, or portions thereof, is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code, we will address these claims.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.² Section 261.201 provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). After carefully reviewing your arguments and the remaining submitted information, we find that this information does not consist of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261); *see also* Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor to Fam. Code § 261.201). Accordingly, we conclude that the district attorney may not withhold any portion of the remaining submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

In addition, you claim that the remaining submitted information is excepted from disclosure pursuant to section 552.108 as attorney work product. Section 552.108 provides in pertinent part:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: . . . (4) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of 552.021 if: . . . (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(4), (b)(3), (c). A governmental body that raises section 552.108 for information that it wishes to withhold must reasonably explain how and why section 552.108 applies to that information. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

We note that in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. We find that the requestor in this instance essentially seeks all information concerning the subject matter of this request that is contained within the district attorney's litigation files regarding this case. Thus, we agree that *Curry* and section 552.108(a)(4) of the Government Code is applicable to the remaining submitted information.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See Gov't Code* § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made

available to public, including detailed description of offense). Accordingly, we conclude that with the exception of basic information that must be released to the requestor, the district attorney may withhold the remaining submitted information pursuant to section 552.108(a)(4) of the Government Code. We note, however, that the district attorney maintains the discretion to release all or part of this information that is not otherwise confidential by law.³ See Gov't Code § 552.007.

In summary, the district attorney need not release the information that we have marked that is not subject to the Act. The district attorney must release the arrest warrant and supporting affidavits that we have marked pursuant to article 15.26 of the Code of Criminal Procedure. The district attorney must release the search warrant affidavits that we have marked pursuant to article 18.01(b) of the Code of Criminal Procedure. With the exception of basic information that must also be released, the district attorney may withhold the remaining submitted information pursuant to section 552.108(a)(4) of the Government Code.⁴

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

³ As our ruling is dispositive, we need not address your remaining arguments.

⁴ We note that portions of the submitted information constitute information relating to the requestor's client that would normally be excepted from disclosure to the general public under laws and exceptions that are designed to protect privacy interests. However, as the representative of the subject of this particular information, the requestor has a special right of access to that information. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). We note, however, that if the district attorney receives another request for this information from someone other than the requestor or the requestor's client, the district attorney should again seek our decision before releasing this information to that requestor.

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



-Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 214329

Enc. Marked documents

c: Mr. Nicolai von Kreisler
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(w/o enclosures)